No. 617

In the Supreme Court of the United States

OCTOBER TERM, 1952

DISTRICT OF COLUMBIA, PETITIONER

v.

JOHN R. THOMPSON COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The United States respectfully urges the Court to grant the petition for a writ of certiorari which has been filed by the District of Columbia.

The Court of Appeals, sitting in banc, held in this case that two anti-discrimination statutes enacted by the Legislative Assembly of the District of Columbia in 1872 and 1873, during a brief period in which the residents of the District enjoyed a form of local self-government, are not enforceable. The importance of the case and of the constitutional and statutory questions decided

by the Court of Appeals extends; however, far beyond the holding as to the nonenforceability of the Acts of 1872 and 1873. Although the majority judges did not join in a single opinion for the court, the opinions of Chief Judge Stephens (on behalf of Judges Clark, Miller, Proctor, and himself) and Judge Prettyman (with whom Judge Miller also concurred) are in fundamental agreement on major issues in the case. Briefly, these issues concern (a) the scope of the constitutional power of Congress in relation to the District of Columbia; (b) the extent to which Congress can constitutionally establish a local government in the District of Columbia and delegate to it authority to enact local laws; (c) the scope of the legislative authority delegated by Congress to the Legislative Assembly of the District of Columbia in the Organic Act of 1871 (16 Stat. 419); and (d) the validity and present enforceability of the anti-discrimination statutes enacted by the Legislative Assembly.

These questions of constitutional law and statutory construction are obviously not of mere local concern. On the contrary, it is submitted, the issues raised by the decision of the Court of Appeals are of such large national importance as to warrant review by this Court.

I

In 1871 Congress, acting under the power granted it by the Constitution to "exercise exclusive Legislation" over the District of Columbia (Article I, Section 8), established a territorial form of government in the District. The Organic Act of February 21, 1871, vested "legislative power and authority" in a Legislative Assembly, consisting of a Council and a House of Delegates. (Section 5.)[1] The Act provided that *"the legislative power of the District shall extend to all rightful subjects of legislation within said District,* consistent with the Constitution of the United States and the provisions of this act * * *." (Section 18; italics supplied.) The executive authority was vested in a Governor, appointed by the President with the advice and consent of the Senate. (Section 3.)[2]

In 1872 and 1873 the Legislative Assembly of the District of Columbia enacted two statutes which made it a criminal offense for owners of restaurants and certain other places of public

[1] The Act also provided that the members of the Council were to be appointed by the President with the advice and consent of the Senate, and that the members of the House of Delegates were to be elected by male citizens of the United States residing in the District.

[2] This form of government was short-lived, ending with enactment of the Temporary Organic Act of June 20, 1874, 18 Stat. 116, which substituted a temporary government of three Commissioners appointed by the President. The Commissioner form of government was placed on a permanent basis by the Organic Act of June 11, 1878, 20 Stat. 102.

accommodation (hotels, bathhouses, barber shops, and bars) to refuse service to any "well-behaved, respectable" person because of his race or color.[3] These statutes supplemented and gave concrete application to the Thirteenth, Fourteenth, and Fifteenth Amendments, adopted but a few years earlier, which were designed to assure the newly freed slaves that they stood free and equal before the law and would not be discriminated against on account of race, color, or previous condition of servitude.

For more than three-quarters of a century, however, the Acts of 1872 and 1873 lay dormant. Prior to this prosecution, authorized by the District Commissioners in 1950, no attempt was made after 1874 to enforce the Acts, even though violations were, and continue to be, open and frequent. This case was brought in order to settle the questions (1) whether the Acts of 1872 and 1873 were valid when enacted, and (2) if so, whether they are still in full force and effect.

II

The judgment of the Court of Appeals, holding that the Acts of 1872 and 1873 are unenforceable, was concurred in by five judges constituting

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[3] Violation was made punishable as a misdemeanor by a $100 fine and forfeiture of license for one year.

a majority of the full court.[4] The grounds for this holding are set forth in the separate opinions of Chief Judge Stephens (R. 60–89) and Judge Prettyman (R. 89–100). Except in one relatively minor respect (see footnote 7, *infra*), Judge Prettyman's views on the basic issues in the case coincide with those expressed by Chief Judge Stephens. Both opinions agree on the following propositions:

(1) Congress lacks power under the Constitution to delegate to a local government in the District of Columbia authority to enact "general legislation"; only the authority to enact "regulatory municipal ordinances" can constitutionally be delegated.[5]

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[4] Judge Fahy, with whom Judges Edgerton, Bazelon, and Washington concurred, dissented (R. 100–120). The dissenting judges were of the view that the Acts of 1872 and 1873 were valid when enacted and have not been repealed.

[5] See opinion of Chief Judge Stephens at R. 79, 82.

The opinion of Judge Prettyman is equally explicit in expressing the view that Congress can delegate only the authority to enact "municipal regulations" and not "general legislation":

> * * * There are two possible views. Either they [the 1872 and 1873 Acts] were general legislation, *e. g.*, relating to civil rights, use of property, validity of contracts, or similar subjects; or they were municipal ordinances regulatory of licensed businesses. * * *
>
> The judges who join Chief Judge Stephens take the former view. There are reasons, which he describes, which support that view. From that premise I think the next steps in his opinion follow inevitably. *If the enactments constituted legislation they were invalid when enacted by the Legislative Assembly, being beyond*

(2) Although Congress in the Organic Act of 1871 empowered the Legislative Assembly of the District of Columbia to deal with "all rightful subjects of legislation within said District," this delegation of legislative power could not, and did not, include authority to enact local anti-discrimination laws; such laws come within the proscribed category of "general legislation" even though applicable only within the District of Columbia.[6]

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the power permitted a municipal body in the District of Columbia by the Constitution * * *.

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* * * They [the dissenting judges] say, first, that the Legislative Assembly was a legislative body. But, of course, it could not be a true legislative body. Under the Constitution the Congress is, and can be, the only legislative body for the District of Columbia. The Assembly was legislative only in the sense that the word applies to the adoption of municipal ordinances, and in that sense alone.

* * * * *

* * * If they [the 1872 and 1873 Acts] were general legislation they were void from the beginning * * *. (R. 89, 97, 99; italics supplied.)

[6] The line between "general legislation" and "regulatory municipal ordinances" appears to be somewhat blurred. Chief Judge Stephens admitted "that, for lack of a precise criterion, the determination of what powers are strictly 'municipal' and may therefore rightly be conferred upon local corporations, and what powers are properly 'legislative' and cannot therefore be delegated, is not always without difficulty." (R. 79.) He thought it clear, however, that the Acts of 1872 and 1873 were "general legislation" because they limited the freedom of the owner of a restaurant "in the use of his property, in the exercise of his power

(3) To the extent that the Acts of 1872 and 1873 constitute "general legislation," they were not only invalid when enacted but for the same reason were also repealed by the District of Columbia Code of 1901 (31 Stat. 1189), since the Code repealed acts of the Legislative Assembly which were "general" in nature and these Acts were not saved from repeal by any exception contained in the Code.[7]

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to contract, and in the carrying on of a lawful calling" (R. 79) and were "in the nature of civil rights legislation" (R. 81).

Judge Prettyman agreed that acts "relating to civil rights" come within the prohibited class of "general legislation." He cited, as examples of "general legislation," those "relating to civil rights, use of property, validity of contracts, or similar subjects." (R. 89.)

[7] The holding that the Acts of 1872 and 1873 were "general legislation" and hence invalid when enacted was thus also conclusive of the question of repeal under the 1901 Code, and the court's conclusion on the latter issue falls if its conclusion on the former is held erroneous. Chief Judge Stephens stated that the Acts of 1872 and 1873 were "of the character of general legislation, the power to enact which the Congress could not constitutionally delegate to the Assembly," and that "in the Act of February 21, 1871, creating the District government and the Legislative Assembly, the Congress did not attempt to endow the Assembly with power to enact such measures * * *." (R. 82.) His opinion also stated (R. 85) that the finding that the Acts of 1872 and 1873 were "general legislation" required the further conclusion that they were repealed by the District of Columbia Code of 1901 (31 Stat. 1189).

Judge Prettyman concluded that the 1872 and 1873 Acts are now unenforceable, whether they are regarded as "general legislation" or "regulatory municipal ordinances". His reasoning was as follows: If the Acts of 1872 and 1873 consti-

III

On the merits, the rulings made by the Court of Appeals in this case are clearly erroneous. As appears *infra*, pp. 17–21, there is a long, unbroken line of decisions of this Court which (a) uphold the power of Congress under the Constitution to delegate to the federal territories, including the District of Columbia, authority to legislate on local matters, and (b) construe territorial organic acts containing provisions substantially identical to Section 18 of the District of Columbia Organic Act of 1871 as delegating comprehensive authority to enact local legislation.

Nothing in the Constitution, or in the decisions of this Court interpreting it, supports the notion that the constitutional power of Congress to delegate local legislative authority in the District is limited by a vague and undefined distinction between "general legislation" and "municipal regulations." That distinction was evolved in the law of municipal corporations governing the powers of ordinary municipalities within a state. Even in that context, it does not forbid a state, if

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tuted "general legislation," they were, for the reasons stated by Chief Judge Stephens, invalid when enacted, and in any event repealed by the 1901 Code; if the Acts were "regulatory municipal ordinances" and valid when enacted, they "must be deemed by the courts to have been abandoned by the licensing authority" (R. 89–90).

For the reasons set out in footnote 26, *infra*, the Government believes that both these grounds for holding the Acts unenforceable are clearly without merit.

it chooses to do so, to delegate to a municipality authority to enact local ordinances dealing with a "general" subject-matter. In any event, the considerations underlying that distinction are wholly inapplicable to the District of Columbia, and it has no relevance in determining the scope of the power granted to Congress in the Constitution for governing the District of Columbia.

Apart from the decision of the Court of Appeals in this case, there could be no doubt (as is shown *infra*, pp. 13–21) of the power of Congress to establish a local government in the District of Columbia and to delegate to it authority to enact local legislation. The decision below, however, has created widespread uncertainty and stirred grave doubts as to the extent of the power of Congress in relation to the District of Columbia. This aspect of the decision below has particular significance at the present time, when Congress is considering proposed legislation to grant "home rule" to the residents of the District of Columbia. In his address to Congress on February 2, 1953, President Eisenhower recommended that "Here in the District of Columbia, serious attention should be given to the proposal to develop and to authorize, through legislation, a system to provide an effective voice in local self-government."[8] Bills providing home rule for the District were passed by the Senate in

[8] H. Doc. No. 75, 83d Cong., 1st Sess., p. 13.

1949 (81st Cong., 1st Sess.)[9] and again in 1952 (82d Cong., 2d Sess.).[10] Similar legislation has been introduced at the present session.[11]

The proposals for home rule in the District have two main objectives which give the matter national as well as local importance: (1) To extend to the residents of the District of Columbia, as fully as is consistent with the national interest, the democratic right, enjoyed by all other American citizens, of local self-government. (2) To relieve Congress of the unnecessary, time-consuming burden of acting as a city council for the District. The Joint Committee on the Organization of Congress (the La Follette-Monroney committee) reported that "a high percentage of congressional time is devoted to matters of purely local or petty importance. More time is consumed in serving as the city council for the District of Columbia than is spent on matters involving great importance to the Nation. * * * The Nation cannot afford the luxury of having its national legislative body and the District committees in both the House and Senate perform the duties of a city council for the District of Columbia. In order to relieve Congress of this extraneous work-load and enable it to devote full attention to national legislation, we recommend that a

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[9] S. 1527; 95 Cong. Rec. 7010–7018.

[10] S. 1976; 98 Cong. Rec. 391.

[11] S. 999; H. R. 1396.

plan for self-rule for the District of Columbia be provided as early as possible." [12]

The question whether, and in what form, Congress should grant the people of the District of Columbia home rule with authority to enact local laws incident to self-government, including those dealing with problems arising from racial discrimination, is properly one of legislative policy and not of constitutional power. Prior to the decision below, Congress was concerned more with the wisdom of such legislation than its constitutionality.[13] The decision of the Court of Appeals in this case compels Congress to deal with home rule legislation under a heavy overhanging cloud of doubt and confusion as to the extent of its constitutional power. That cloud would remain indefinitely as an effective obstacle to legislative action, if the decision below should stand unreviewed. In the national interest, review and reversal of the decision of the Court of Appeals is required to enable Congress to deal with the question of home rule for the District as it should be dealt with, in the framework of

[12] S. Rep. No. 1011, 79th Cong., 2d Sess., p. 24.

[13] See, *e. g.*, the report of the Senate Committee on the District of Columbia recommending enactment of S. 1976 by the 82d Congress. That report contained a supporting memorandum of law which concluded that there was no doubt as to the power of Congress "to vest in a legislative body established for the District of Columbia general legislative power with respect to the District." (S. Rep. No. 630, 82d Cong., 1st Sess., p. 13.)

legislative policy determination rather than of constitutional interpretation.

A further reason exists for granting the writ in this case. The Court of Appeals has held unenforceable two local laws prohibiting racial discrimination by owners of restaurants and certain other places of public accommodation in the District of Columbia. The decision below does more than to deprive these Acts of vitality; in holding that "civil rights legislation" is outside the proper limits of municipal power, the court has erected a barrier against delegation by Congress to the people of the District of Columbia of authority to deal, on a local basis, with the problem of racial discrimination in the District.

The importance of solving this problem is emphasized by the recognition given it by the President in his address to the Congress on February 2, 1953, in which he reviewed the major issues confronting the country and stated the basic policies which would be pursued by the Administration in dealing with them. He said:

> Our civil and social rights form a central part of the heritage we are striving to defend on all fronts and with all our strength.
>
> * * * * *
>
> A cardinal ideal in this heritage we cherish is the equality of rights of all citizens of every race and color and creed.

> We know that discrimination against minorities persists despite our allegiance to this ideal.
>
> * * * * *
>
> I propose to use whatever authority exists in the office of the President to end segregation in the District of Columbia, including the Federal Government * * *.[14]

Several hundred thousand Federal employees, representing every segment of our population, work and live in the District of Columbia area. It is the established policy of the United States that its employees shall be hired, and shall work together, without regard to any differences of race or color.

IV

So far as concerns the power of Congress to legislate for it, or to delegate local legislative power, the District of Columbia stands on the same constitutional footing as other federal territories. The government of the District was specifically provided for by Article I, Section 8 of the Constitution, which reads as follows:

> The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over, such District * * * as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *.

[14] H. Doc. No. 75, 83d Cong., 1st Sess., p. 13.

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[14] H. Doc. No. 75, 83d Cong., 1st Sess., p. 13.

The word "exclusive" does not, as the majority judges in the Court of Appeals seemed to assume, mean "non-delegable." It was put into the constitutional provision solely in order to make it clear that the law-making authority of Congress should be exclusive and not concurrent with that of the ceding states. See *The Federalist*, No. 43. The Supreme Court of the District of Columbia, in 1879, correctly observed "that the term 'exclusive' has reference to the States, and simply imports *their* exclusion from legislative control of the District, and does not necessarily exclude the idea of legislation by some authority subordinate to that of Congress and created by it." *Roach v. Van Riswick*, MacArthur & Mackey 171, 174.[15]

There is no significant difference, with regard to the power of Congress to delegate local legislative authority, between Article I, Section 8, dealing with the District of Columbia, and Article IV, Section 3, dealing with the other federal territories. The latter provision reads:

> The Congress shall have Power to dispose of and make all needful Rules and Regu-

[15] The framers of the Constitution apparently took it for granted that local self-government would be established for the District of Columbia. Madison wrote in *The Federalist*, No. 43: "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them [the residents of the District]." And almost immediately upon assuming control over the District area, Congress established local governments, with popularly elected legislative bodies, which continued until 1871. See footnote 23, *infra*.

> lations respecting the Territory or other Property, belonging to the United States * * *.

The word "exclusive" in Article I, Section 8, serves the same function as "all" in Article IV, Section 3. Under both provisions it is clear that the law-making power of Congress with respect to the District of Columbia and the territories is exclusive, but only in the sense that no state can intrude upon its supreme legislative authority; under neither provision is Congress precluded from creating subordinate bodies endowed with local legislative authority.

The Act of July 16, 1790, 1 Stat. 130, in which Congress established the District of Columbia as the permanent seat of the government of the United States, described it as a "district of territory." (See footnote 23, *infra*.) And when Congress in the Organic Act of 1871 established a single unified government for "all that part of the territory of the United States included within the limits of the District of Columbia" (16 Stat. 419), the debates on the bill reflected an explicit recognition that it was creating a territorial government for the District patterned on other territorial governments. Cong. Globe, 41st Cong., 3d Sess., 642–644, 686–687, 1363. And both this Court and the Court of Appeals for the District of Columbia, in referring to the form of government established by the 1871 Act, characterized it as a "territorial government." *Eckloff* v. *District of*

Columbia, 135 U. S. 240, 241; *District of Columbia* v. *Hutton*, 143 U. S. 18, 20; *Roth* v. *District of Columbia*, 16 App. D. C. 323, 330; and see *Grant* v. *Cooke*, 7 D. C. 165, 194, 200–201.

The Act of 1871 delegated to the Legislative Assembly of the District of Columbia an all-embracing legislative power extending "*to all rightful subjects of legislation within said District*, consistent with the Constitution of the United States and the provisions of this act, * * *." [Section 18; italics added.][16] The words "all rightful subjects of legislation" did not originate in the Organic Act of 1871. Congress used substantially identical language in defining the legislative powers of the territorial governments established in earlier territorial organic acts;[17] and

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[16] This comprehensive power was restricted in two respects: (1) the prohibitions upon the powers of the States contained in Article I, Section 10 of the Constitution (*i. e.*, against entering into treaties, granting letters of marque and reprisal, coining money, etc.) were made applicable to the District of Columbia; and (2) Congress reserved the right to repeal or modify all acts of the Legislative Assembly. In addition, the act withheld from the Legislative Assembly power to legislate on specified matters such as divorce, descent, court procedure, and remission of fines. None of these is relevant to the acts involved in the present case. 16 Stat. 419, 423.

[17] Territorial Organic Acts of: *Louisiana* (March 26, 1804, 2 Stat. 283, 284); *Wisconsin* (April 20, 1836, 5 Stat. 10, 12); *Iowa* (June 12, 1838, 5 Stat. 235, 237); *Oregon* (Aug. 14, 1848, 9 Stat. 323, 325); *Minnesota* (March 3, 1849, 9 Stat. 403, 405); *New Mexico* (Sept. 9, 1850, 9 Stat. 446, 449); *Utah* (Sept. 9, 1850, 9 Stat. 453, 454); *Washington* (March 2, 1853, 10 Stat. 172, 175); *Nebraska* and *Kansas* (May 30, 1854, 10

these provisions in the various acts were codified in Section 1851 of the Revised Statutes (1873–1874) as follows: "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." And see 48 U. S. C., secs. 77 and 562.

This Court, in construing these provisions, has held that the words "all rightful subjects of legislation" embrace all laws which are local and appropriate to territorial self-government. In *Maynard* v. *Hill*, 125 U. S. 190, 204, the Court took note of the essential similarity of the provisions in the organic acts defining the legislative powers of the territories, and held that what were "rightful subjects of legislation" was to be determined "by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented." In *Cope* v. *Cope*, 137 U. S. 682, 684, the Court, referring to such a provision in the Utah Organic Act, stated that, aside from the exceptions expressly contained in that Act, "the power of the Territorial legislature was apparently as plenary as that of the legislature of a State." Accord: *Hornbuckle* v. *Toombs*, 18 Wall.

Stat. 277, 279, 285); *Colorado* (Feb. 28, 1861, 12 Stat. 172, 174); *Dakota* (March 2, 1861, 12 Stat. 239, 241); *Arizona* (Feb. 24, 1863, 12 Stat. 664, 665); *Idaho* (March 3, 1863, 12 Stat. 808, 810); *Montana* (May 26, 1864, 13 Stat. 85, 88); *Wyoming* (July 25, 1868, 15 Stat. 178, 180).

648, 655–656. And in *Christianson* v. *King County*, 239 U. S. 356, 365, it was said that "'Rightful subjects' of legislation * * * included all those subjects upon which legislatures have been accustomed to act." See also *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 260–262.

The grant of legislative power to deal with local matters, contained in the District of Columbia Organic Act of 1871 and in the other territorial organic acts, is thus "as broad and comprehensive as language could make it." *Puerto Rico* v. *Shell Co.*, *supra*, at 261. In effect, these acts constitute delegations by Congress to the territorial legislatures of all the local legislative power that Congress can constitutionally delegate. The power of Congress to make such delegations is indisputable. *Simms* v. *Simms*, 175 U. S. 162, 168; *Binns* v. *United States*, 194 U. S. 486, 491; *Miners' Bank* v. *Iowa*, 12 How. 1; *Christianson* v. *King County*, 239 U. S. 356, 365. Accordingly, this Court and the lower federal courts have consistently sustained the validity of territorial legislation dealing with subjects which, in a state, would ordinarily be dealt with by the state legislature. *Hornbuckle* v. *Toombs*, 18 Wall. 648 (procedural code limiting forms of action); *Maynard* v. *Hill*, 125 U. S. 190 (divorce statute); *Cope* v. *Cope*, 137 U. S. 682 (statute permitting illegitimate children to inherit); *Atchison, T. & S. F. Ry.* v. *Sowers*, 213 U. S. 55 (statute limiting tort claims); *Christianson* v. *King County*, 239

U. S. 356 (act escheating property); *Puerto Rico* v. *Shell Co.*, 302 U. S. 253 (anti-trust statute); *People of Porto Rico* v. *American R. R. Co.*, 254 Fed. 369 (C. A. 1) (act regulating freight rates); *Richards* v. *Bellingham Bay Land Co.*, 54 Fed. 209 (C. A. 9) (statute abolishing dower).

It is particularly significant that several territories, acting under grants of legislative authority like that contained in the District of Columbia Organic Act of 1871, have enacted laws prohibiting racial discrimination in places of public accommodation. Alaska Compiled Laws, Section 20–1–3 (1949); Puerto Rico Laws, 1943, Act No. 131, pp. 404–406;[18] Virgin Islands, Act of September 12, 1950, Bill No. 1, 15th Legislative Assembly of Virgin Islands, 1st session. The constitutionality of such anti-discrimination legislation under the Fifth and Fourteenth Amendments is, of course, beyond question. *Railway Mail Association* v. *Corsi*, 326 U. S. 88, 93–94, 98; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 31, 34; *Western Turf Association* v. *Greenberg*, 204 U. S. 359; *Rhone* v. *Loomis*, 74 Minn. 200; *People* v. *King*, 110 N. Y. 418.

If Congress sees fit to do so, the Constitution thus permits it to delegate power to the people

[18] The Puerto Rico statute has been upheld by the Supreme Court of Puerto Rico as a proper exercise of the legislative power granted to the Territory by Congress. *People of Puerto Rico* v. *Suazo*, 63 Puerto Rico Reports 869.

of a territory to govern themselves and to enact local laws incident to self-government. In the past Congress has pursued the policy of delegating such local legislative power as soon as it found that the people of a territory were ready to assume this responsibility.[19] The Constitution does not prevent Congress from treating the District of Columbia on the same basis. The Court has recognized that whether, and the extent to which, Congress should grant "home rule" and delegate authority to enact local laws in the territories, including the District of Columbia, is solely a matter of legislative policy:

> It must be remembered that Congress, in the government of the Territories *as well as of the District of Columbia,* has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a *quasi* state government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to this form. In the

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[19] In *Clinton* v. *Englebrecht*, 13 Wall. 434, 441, the Court noted that the Congressional policy underlying the broad grants of legislative authority to the territories "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority * * *."

District of Columbia, it has adopted a different mode of government, and in Alaska still another. *It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory.*[20]

V

The majority judges of the Court of Appeals took a different view of the constitutional power of Congress to delegate legislative authority to a local government in the District of Columbia. Congress, they held, cannot grant authority to enact "general legislation"; its delegatory authority is restricted to "municipal regulations and ordinances"; and "general legislation" includes enactments which "are in the nature of civil rights legislation," or which restrict freedom of contract, use of property, or carrying on a lawful calling. See pp. 5–7, *supra*.

This test of delegability, if accepted, would appear to preclude even a grant of authority to enact ordinances dealing with such clearly local matters as land zoning, regulation of building construction, public health regulation, etc. All of these limit freedom of contract, use of property, and the exercise of a lawful calling, but it could not be seriously contended that they are for that reason beyond the power of local governments.

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[20] *Binns* v. *United States*, 194 U. S. 486, 491. (Italics added.)

In any event, this distinction between "general legislation" and "municipal regulations," which can find no support in the language or history of the constitutional provision, has no relevance to the problem of determining the power of Congress in relation to the District of Columbia. The distinction derives from the law of municipal corporations applicable to municipalities within a state. In a state, legislation of a municipality may possibly encroach upon powers reserved by the state legislature or interfere with the rights of other municipalities. Some matters, like the law of marriage and divorce, are usually regarded as of state-wide concern and as calling for uniform state-wide treatment, unless expressly delegated to municipalities. In the law of municipal corporations these are regarded as the subjects of "general legislation."[21] On the other hand, matters which may appropriately be dealt with on a local basis by a municipality, in the absence of overriding state law to the contrary, are regarded as proper subjects of "municipal regulations." The essence of the distinction is geo-

[21] This does not imply that a state could not delegate to a municipality authority to enact local laws dealing with a subject of "general legislation." The extent to which a state can delegate its power to a municipal government is a matter for its own determination. *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178–179; *Milwaukee* v. *Raulf*, 164 Wis. 172, 183; *Duluth* v. *Cerveny*, 218 Minn. 511, 515.

graphical. McQuillin, *Municipal Corporations* (3d ed. 1949), section 23.03.[22]

The geographical basis underlying the distinction between "general legislation" and "municipal regulations" does not exist in the District of Columbia. In the District the powers of local government are geographically coextensive with the entire area of the territory. In this crucial respect it is totally unlike the ordinary municipality within a state, and like a territory it combines elements both of a city and state. Congress itself described the District of Columbia, in the Act of July 16, 1790, 1 Stat. 130, establishing the District as the permanent seat of the government of the United States, as a "district of territory." (See footnote 23, *infra.*) And, in similar recognition of the fact that the District is not comparable to a city in a state, this Court has said "that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State"

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[22] As has been noted (footnote 16, *supra*), the Organic Act of 1871 expressly withheld from the Legislative Assembly of the District the power to deal with certain specified subjects. Section 17 contained a list of laws which could not be enacted by the Legislative Assembly. Among these were laws for granting divorces; changing the law of descent; and affecting the sale or mortgage of real estate belonging to minors. This enumeration of forbidden subjects of local legislation did not include "civil rights" or "anti-discrimination" laws. By plain implication, these were included within the residual category of "all rightful subjects of legislation" upon which the Assembly was empowered to act.

to which Congress can grant "subordinate legislative powers of a municipal character * * *". *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, 9.

To be sure, there was a time, prior to 1871, when the District of Columbia comprised more than one municipality;[23] at that time an analogy

[23] The Act of July 16, 1790, 1 Stat. 130, provided that a "district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, * * * is hereby accepted for the permanent seat of the government of the United States."

When the United States took possession of the District of Columbia in December, 1800, it was divided by Congress into two counties, that of Alexandria on the west side of the Potomac, and that of Washington on the east side; the laws of Virginia were continued over the former, and the laws of Maryland over the latter. Act of February 27, 1801, 2 Stat. 103.

Within part, but not all, of the area of the county of Washington were the cities of Washington and Georgetown. The latter had been incorporated by the Maryland legislature in 1789, and its status and powers were continued by Congress. Act of February 27, 1801, 2 Stat. 103, 108. In 1802 the city of Washington was incorporated by Congress and endowed with the usual powers of a municipal government. Its council, elected by the white male residents of the city, was empowered to pass by-laws and ordinances. Act of May 3, 1802, 2 Stat. 195; and see Act of February 24, 1804, 2 Stat. 254.

In 1805 Congress amended the charter of the city of Georgetown to provide for a board of aldermen and a common council, both to be elected by the "free white male citizens" of the city, and having the usual legislative powers of a municipal government. Act of March 3, 1805, 2 Stat. 332. In 1812 the charter of the city of Washington was amended in similar fashion. Act of May 4, 1812, 2 Stat. 721. The county of Washington was governed by a levy court, com-

to the law of municipal corporations applicable in the states might have been relevant in determining the powers of each such municipality. But there could certainly have been no doubt then that the territory comprising such municipalities, i. e., the entire District of Columbia area, was—so far as the power of Congress to delegate legislative authority was concerned—a territory and not an ordinary municipality. Obviously, the consolidation in 1871 of these municipalities into a single unified government for the District of Columbia did not alter its constitutional status, or diminish the power of Congress in relation to it.

In the District of Columbia, as it was constituted by the Act of 1871 and as it exists today, there can be no problem of conflicting laws enacted by different municipalities within the District. For this reason, laws passed by the Legislative Assembly defining crimes have been upheld, *United States* v. *May;* 2 MacArthur 512, notwithstanding that a municipal ordinance of such a nature, if enacted by a city within a state, might

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posed of seven commissioners appointed by the President. Act of July 1, 1812, 2 Stat. 771. The county of Alexandria was re-ceded to Virginia by the Act of July 9, 1846, 9 Stat. 35.

This pattern of local government within the District continued, substantially unchanged, until the 1871 Organic Act established a single unified government for the entire District of Columbia. See Acts of May 15, 1820, 3 Stat. 583; May 17, 1848, 9 Stat. 223; August 6, 1861, 12 Stat. 320; March 3, 1863, 12 Stat. 799.

possibly be regarded as "general legislation" reserved, unless expressly delegated, as a subject for state-wide legislation.

Mr. Justice Holmes observed that "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[24] In this case the majority judges in the court below, without examining the considerations which differentiate the District of Columbia from an ordinary municipality within a state, and which make inapplicable the distinction between "general legislation" and "municipal regulations", assumed its applicability as a constitutional limitation on the powers of Congress in relation to the District of Columbia. Their main reliance was upon this Court's decision in *Stoutenburgh* v. *Hennick*, 129 U. S. 141. But that case held only that the Legislative Assembly had no power to enact a law restricting commerce with persons outside the District, and that the regulation of interstate commerce rested within the exclusive power of Congress. True, the Court's opinion in that case stated that Congress "could only authorize it [the District of Columbia] to exercise municipal powers * * *" (p. 147). But the preceding paragraph of the opinion leaves no doubt as to what was meant by "municipal powers":

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[24] *Hyde* v. *United States*, 225 U. S. 347, 391 (dissent).

> It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.

In its context, therefore, the statement that "general affairs" shall be managed "by the central authority" means simply that national matters, such as regulating interstate commerce, declaring war, raising armies, establishing uniform rules of naturalization, etc., are to be dealt with by Congress on a national basis, and not by a local legislature in the District on a local basis. The Court, in the same sentence, reiterated the "cardinal principle of our system of government, that local affairs shall be managed by local authorities * * *." It neither stated nor implied that there existed a class of "local affairs

of a general nature" which could not constitutionally be delegated to local authorities.[25]

VI

Even if the distinction between "general legislation" and "municipal regulations" is assumed to be applicable, the Acts of 1872 and 1873 involved in this case should be upheld as valid "municipal regulations."[26]

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[25] *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1, the only other decision of this Court cited in Chief Judge Stephens' opinion, held only that under the Act of June 11, 1878 (20 Stat. 102), the District of Columbia had a right to bring suit in its own name. That right was expressly granted by the 1871 Organic Act, and the Court construed the 1878 Act as also giving the District such right. Neither that case nor the decisions of the lower District of Columbia courts cited in the opinion of Chief Judge Stephens furnish any support for the asserted limitation on the power of Congress to delegate local legislative authority.

[26] Similarly, the Acts of 1872 and 1873 were not repealed by the 1901 Code, no matter what label is applied to them. Section 1640 of the Code provided that:

> Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law * * * or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code.

It is not claimed that the 1872 and 1873 Acts were expressly or specifically repealed by any provision in the 1901 Code. The argument for repeal is based mainly on Section 1636 of the Code, which repealed "All acts and parts of acts of the general assembly of the State of Maryland, general and permanent in their nature" and "all like acts and parts of acts of the legislative assembly of the District of Columbia * * *". Expressly excepted in that section from repeal

both Part I and Part II.

Judge Cox in a letter to President Noyes, dated October 20, 1891, stated, among other things, as follows:

> Our laws, as a whole, may be said to be half a century behind those of the States in their adaptation to modern business and social conditions.
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> * * * * * * *
>
> The law of crimes and punishments needs overhauling, as well as our criminal procedure.
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> * * * * * * *
>
> These changes are the objects which I have aimed at in preparing a code. I have taken existing laws as a starting point, and have endeavored to clear up obscurities in them and have added new features borrowed from other codes. I have had before me the codes of Maryland, Virginia, New York and Ohio, and have found many improvements common to them all, which ought long since to have been introduced here. I have also added original matter suggested by my own experience.
>
> Having done this work without assistance and at odd moments, I cannot flatter myself that it is free from errors and defects; but I think that, as a whole, it will be an improvement upon the existing condition of things, and it would be desirable to have it enacted into law, even if it shall need to be amended afterward. The only possible way of having this done, as it seems to me, is to present it to Congress in a complete form, with the indorsement of the Board of Trade and the Bar Association,

Except as limited by constitutional or statutory prohibitions, express or implied, the delegated power of municipalities to enact regulatory ordinances is as broad as the police power of a state. *City of Phoenix* v. *Michael,* 61 Ariz. 238, 243; *Shepherd* v. *McElwee,* 304 Ky. 695, 698;

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were, *inter alia*, acts "relating to * * * police regulations, and generally all acts and parts of acts relating to municipal affairs only * * *."

As is shown by the many cases cited in the opinion of Chief Judge Cayton in the Municipal Court of Appeals (R. 34), the continuing validity of penal laws enacted by the Legislative Assembly, unless expressly superseded, has consistently been recognized by Congress and the courts of the District. See, especially, *Johnson* v. *District of Columbia*, 30 App. D. C. 520, upholding a conviction under a cruelty-to-animals statute enacted by the Legislative Assembly in 1871. The Court of Appeals for the District of Columbia held that that statute, which does not essentially differ from the 1872 and 1873 Acts here involved, was saved from repeal by the "police regulations" exception of the 1901 Code.

In any event, the Acts of 1872 and 1873 are squarely within the exception of "acts relating to municipal affairs". The words "municipal affairs" in this context were not limited to matters pertaining to municipal organization and internal administration but were intended to save all existing acts and ordinances properly comprising a municipal code. See H. Rep. No. 1017, 56th Cong., 1st Sess.; *Carr* v. *Corning*, 182 F. 2d 14, 18, 19 (C. A. D. C.); cf. *Porter* v. *Santa Barbara*, 140 Cal. App. 130, 35 P. 2d 20; *Home Tel. & Tel. Co.* v. *Los Angeles*, 155 Fed. 554, 564 (C. C. S. D. Cal.). This is evidenced by the further fact that Section 1636 stated that "acts relating to municipal affairs only" should include "those regulating the charges of public-service corporations", and that the section expressly saved from repeal "acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of

People v. *Sell*, 310 Mich. 305, 315; *Schultz* v. *State*, 112 Md. 211, 215–218. The regulation of service in restaurants and other places of public accommodation is traditionally regarded as a proper subject of local regulation. See, *e. g.*, *Cooper* v. *District of Columbia*, MacArthur & Mackey 250, 259, 260. If a municipality can regulate a restaurant's sanitary conditions, in the interest of the public health; if it can regulate the construction of its building, its seating arrangements, and the number of its patrons, in the interest of the public safety; then surely it can

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the District of Columbia, or their subordinates or employees * * *". See, generally, *Cape Girardeau County Court* v. *Hill*, 118 U. S. 68, 72.

Judge Prettyman's alternative ground, that the 1872 and 1873 Acts are not now enforceable because they have been "abandoned" by reason of the long failure to enforce them (R. 90), is clearly without substance. Judge Fahy correctly pointed out in the dissenting opinion (R. 114) that the theory of repeal by abandonment rests upon the premise that the 1872 and 1873 Acts were mere conditions imposed upon licenses by the licensing authority. The Acts themselves demonstrate the error of this premise. In express terms they impose an affirmative legal duty of nondiscrimination in service upon owners of restaurants in the District, and make violation of that duty a penal offense punishable by fine and forfeiture of license. While disavowing such a purpose, Judge Prettyman is in effect applying a doctrine, for which he conceded there is no authority whatsoever, of implied repeal of legislation because of nonenforcement. Cf. *Kelly* v. *Washington*, 302 U. S. 1, 14: "Much is made of the fact that the state law remained unenforced for a long period. But it did not become inoperative for that reason. Where the state police power exists, it is not lost by non-exercise but remains to be exerted as local exigencies may demand."

regulate or prohibit, in the interest of the public welfare, any discrimination in service on account of race or color. An anti-discrimination regulation is not essentially different from these other types of regulation. All of them affect the rights and duties of a restaurant owner; all limit his freedom of contract and his use of property. In each case, however, only local regulation is involved.

Moreover, as is abundantly demonstrated in the dissenting opinion of Judge Fahy, municipal governments throughout the country have exercised the power to enact ordinances dealing with racial discrimination in public places. Many of these prohibit racial segregation; others require segregation. Apart from the question of their validity under the Fourteenth Amendment,[27] ordinances requiring racial segregation have been upheld as within the bounds of municipal power. These cases are cited in the opinion of Chief Judge Stephens at R. 82.

Chief Judge Stephens stated that the cases holding ordinances requiring racial segregation to be within the scope of municipal power are not authorities in support of the validity of ordi-

[27] As the Court is aware, it is the position of the United States that racial segregation enforced or supported by law is unconstitutional. See briefs for the United States in the "school segregation" cases now pending before the Court (Nos. 8, 101, 191, 413, 448) and in *Henderson* v. *United States*, 339 U. S. 816; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637.

nances prohibiting segregation. Those cases, he said, are "distinguishable from the instant case because in such cases the ordinances were in accord with a local custom of racial segregation on account of color and were held valid upon the theory that they were for the purpose of preserving peace and good order which would likely be interfered with by racial association." On the other hand, the "enactments involved in the instant case were in conflict with local custom in respect of race association and cannot therefore be justified as in aid of the preservation of peace and order." (R. 83.) [28]

It would appear that under this test an ordinance is "municipal" and valid if a court finds it is in accord with "local custom" and will

[28] Chief Judge Stephens assumed it to be a fact, so clear and indisputable that a court could take judicial notice of it without receiving evidence, that "there was general discrimination on account of color at the time the enactments in question in the instant case were passed" (R. 87), and that such "a custom of race disassociation in the District" (R. 88) has continued to this day.

The dissenting opinion of Judge Fahy, however, shows the lack of factual support for the conclusion that there is, and has been, "a custom of race disassociation in the District" so general and well-known that a court can properly take judicial notice of it (R. 120):

> It is enough to point out that custom has not moved away from equal treatment, leaving these regulations derelicts of the past. Custom has moved toward equal treatment, as is shown by developments of recent years in the Government, in the armed services, in industry, in organized labor, in educational institutions, in sports, in the theatre, and in restaurants in this community, as examples.

help preserve peace and order; if not, the ordinance is "general" and invalid. This seems to mean that no ordinance could be regarded as a valid exercise of municipal authority unless its purpose and effect were to preserve peace and order. But, obviously, the fact that certain non-lawabiding elements might resort to violence in resisting a measure they disapprove cannot establish its invalidity as beyond the limits of municipal power. If Chief Judge Stephens' opinion means that the validity of an ordinance depends upon whether it is in accord with "local custom" as judicially noticed by a court, it would follow that the more widespread and noxious a local evil is, the less would be the power of a municipality to deal with it: a municipal law would be invalid if a court finds it in conflict with "local custom," no matter how deplorable such custom is and how strongly the community desires to alter it.

Judge Fahy, on behalf of the four dissenting judges in the court below, gave the incisive answer to this contention: "If a municipal ordinance may require segregation it may require equal treatment. * * * There is no doctrine known to the law that validity or invalidity of legislation rests upon whether or not it conforms with prevailing custom. Such a consideration goes to the wisdom or policy of the legislation, not to its validity." (R. 108.)

CONCLUSION

The questions of constitutional law and statutory construction presented by this case are of

substantial national importance and warrant review by this Court. The rulings of the Court of Appeals are in conflict with controlling decisions of this Court. The decision below casts a cloud upon the constitutional power of Congress to grant home rule to the District of Columbia and delegate to a local legislature authority to enact local laws. The Court of Appeals has held unenforceable two Acts, enacted by the Legislative Assembly of the District of Columbia during a period when the District had a form of self-government, which made it unlawful for owners of restaurants and other places of public accommodation within the District of Columbia to refuse service to persons on account of race or color. The decision has created doubt and uncertainty as to the extent to which Congress can grant to the residents of the District of Columbia authority to deal with the serious problems arising from racial discrimination in the District.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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